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Civil Action No._____

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM 1984

LOUIS V. MANGRUM, PLAINTIFF-PETITIONER

VS.

CONTINENTAL CASUALTY COMPANY, DEFENDANT-RESPONDENT

This petition seeks a Writ of Certiorari from this Court to the United States Court of Appeals For The Sixth Circuit concerning a diversity of citizenship case involving three intentional torts, libel and slander, malicious prosecution and intentionally interferring with a contract of employment.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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This is to certify that three of Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit have been served on the defendant-respondent by mailing same to its attorney, Hon. Boehl, Stopher, Graves & Deindoerfer, Suite 340, Executive Inn, One Executive Boulevard, Paducah, Kentucky 42001, with postage prepaid pursuant to Rule 28 of this Court.

Louis V. Mangrum

Louis V. Mangrum, counsel for the Plaintiff-Petitioner

QUESTION PRESENTED FOR REVIEW

1. SHOULD THIS COURT INTERVENE IN THIS ACTION BY ISSUING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SO THE APPLICATION OF THE SUBSTANTIVE LAW OF A STATE IN A DIVERSITY CASE MAY BE CLARIFIED AFTER BEING BRIEFED AND TRIED ON ITS MERITS AS IT RELATES TO THREE CAUSES OF ACTIONS IN INTENTIONAL TORTS COMPENSABLE BY BOTH PECUNIARY AND PUNITIVE DAMAGES, INCIDENCE OF BURDEN OF PROOF AND INSTRUCTIONS TO THE JURY WHEREIN PARTIAL SUMMARY, JUDGMENT WAS RENDERED WHEREBY THE COUNT OF LIBEL AND SLANDER AND THE COUNT OF MALICIOUS PROSECUTION, AND SO MUCH OF THE COUNT AS TO THE INTENTIONAL TORT OF INTERFERING WITH A CONTRACT OF EMPLOYMENT AS RELATED TO THE ACTION OF THE KENTUCKY BAR ASSOCIATION AGAINST THE PLAINTIFF-PETITIONER WAS DISMISSED, AN INSTRUCTION ON PUNITIVE DAMAGES WAS REFUSED AND EVIDENCE RELEVANT AND NECESSARY AS TO THE BURDEN OF PROOF IN REGARD TO MOTIVE AND INTENT WAS EXCLUDED AT TWO JURY TRIALS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT?

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VS.

CONTINENTAL CASUALTY COMPANY, DEFENDANT-RESPONDENT

THE PARTIES

The caption herein contains all of the names of the parties in the United States Court of Appeals For The Sixth Circuit as well as the parties before the United States District Court For the Western District of Kentucky, at Paducah.

REFERENCE TO THE JUDGMENTS OF THE LOWER COURTS

The Order of the United States Court of Appeals For The Sixth Circuit affirming the last Judgment of the United States

District Court For The Western District of Kentucky, at Paducah is set out in full in the Appendix. (App. P. 2a) The Order Denying Petition For Rehearing En Banc is set out in full in the Appendix. (App. P. 1a) Both Judgments of the United States District Court For The Western District Of Kentucky, at Paducah, its Order granting a new trial and its Memorandum Opinion rendered in granting partial Summary Judgment to the defendant-respondent are set out in full in the Appendix. (App. PP. 3a, 4a, 5a, 6a, 7a).

GROUNDS FOR JURISDICTION

(i) The Order of the United States Court of Appeals For The Sixth Circuit to be reviewed was dated and entered on September 26, 1984. (App. P. 2a)

(ii) The date and entry of the Order Denying Petition For Rehearing En Banc is November 14, 1984. (App. P. 1a)

(iii) There is not any cross-petition for certiorari expected by the plaintiff-petitioner.

(iv) The statute confering jurisdiction to review by Writ of Certiorari is 28 U. S. C. ¶2101 (c), Supreme Court; Time For Appeal Or Certiorari; Docketing; Stay

(c) Any other appeal or any writ of Certiorari intended to bring any judgment or decree in a civil action, suit or proceedings before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days.

(F) The Rules involved are set forth herein below.

RULE 51. INSTRUCTIONS TO JURY: OBJECTION

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set

forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 56. SUMMARY JUDGMENT

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

STATEMENT OF THE CASE

The plaintiff-petitioner, Louis V. Mangrum, is hereby seeking guidance from this Court to the lower Courts to enable him to obtain a fair trial by a jury of libel and slander, malicious pro-

secution and intentional interference with a contract of employment by illegal means under the law of Kentucky. Said guidance is necessary to enable him to obtain a fair trial in regard to same because at two previous trials by jury the United States District Court For The Western District of Kentucky, at Paducah failed to apply the substantive law of Kentucky pursuant to federal law whereby in Diversity Cases it includes the incidence of the burden of proof whereby the law of evidence is utilized.

The United States Court of Appeals For The Sixth Circuit affirmed the action of the District Court when presented the following issues.

1. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR AGAINST LOUIS V. MANGRUM IN GRANTING SUMMARY JUDGMENT FOR CONTINENTAL CASUALTY COMPANY AS TO THE COUNT IN REGARD TO LIBEL AND SLANDER, AND THE COUNT IN REGARD TO MALICIOUS PROSECUTION, AND SO MUCH OF THE COUNT IN REGARD TO TORTIOUS INTERFERENCE WITH CONTRACT OF EMPLOYMENT AS RELATED TO THE ACTION OF THE KENTUCKY BAR ASSOCIATION AGAINST HIM UNDER THE FACTS AND LAW OF THIS CASE?

2. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR AGAINST LOUIS V. MANGRUM IN REFUSING TO INSTRUCT THE JURY AS TO PUNITIVE DAMAGES UNDER THE LAW AND FACTS OF THIS CASE?

3. DID THE TRIAL COURT COMMIT PREJUDICIAL ERROR AGAINST LOUIS V. MANGRUM IN EXCLUDING CERTAIN EVIDENCE AT THE TRIAL UNDER THE LAW AND FACTS OF THIS CASE?

The plaintiff-petitioner filed a Petition For Rehearing And Request Same Be En Banc in the Court of Appeals whereon he set forth the following:

1. THE DEFENDANT HAVING POSSESSION OF LIBELOUS MATERIAL PER SE AND ITS EMPLOYEES ADMITTING

DISCUSSING SAME CANNOT BE ENTITLED TO SUMMARY JUDGMENT UNDER RULE 56 (c) OF FEDERAL RULES OF PROCEDURE IN A DIVERSITY CASE UNDER KENTUCKY LAW WHERE THERE IS A CONCLUSIVE PRESUMPTION OF BOTH MALICE AND DAMAGE AS SHOWN BY THE CASE OF TUCKER VS. KILGORE, KY. 388 S. W. 2d 112, 1964.

2. IT IS PLAIN ERROR FOR A TRIAL COURT IN A DIVERSITY CASE TO FAIL TO INSTRUCT THE JURY AS TO PUNITIVE DAMAGES UNDER THE LAW OF KENTUCKY AS SHOWN BY THE CASE OF HENKIN INC. VS. BUREA BANK & TRUST COMPANY AND HENKIN VS. DEAN, KY. 566 S. W. 2d 420, 1978, WHERE SAME IS AN ELEMENT OF THE INTERNATIONAL TORT AND REQUIRES THE GRANTING OF A NEW TRIAL HEREIN.

3. THE DECISION OF THIS CASE IS CONTRA TO THIS COURT'S HOLDING IN THE CASE OF OLIN MATHIESON CHEMICAL CORPORATION VS. ALLIS CHAMBERS MANUFACTURING COMPANY, 438 F. 2d 833, (Tenn. 6th. Cir). 1971, IN REGARD T) THE APPLICATION OF RULE 403 IN THE RECEPTION OF EVIDENCE WHEREBY THE LAW OF KENTUCKY AS SHOWN BY THE CASES OF COOK'S ADM'R VS. BANK OF JOSEPHINE, 301 KY. 193, 191 S. W. 2d 209, 1945, AND HARKEY VS. HADDOX, 244 Ky., REQUIRE THE ADMISSION OF THAT BEING COMPLAINED OF BEING EXCLUDED HEREIN DUE TO THE NATURE OF THE INTENTIONAL TORTS REQUIRING PROOF OF STATE OF MIND IN AND BY ACTIONS BOTH AS TO INTENT AND MOTIVE.

The circumstances out of which this case arose began when Frances M. Mangrum sought the services of the plaintiff-petitioner, Louis V. Mangrum, as an attorney concerning a claim she had under the Workers' Compensation Act of Kentucky against the defendant-respondent, Continental Casualty Company, and it wanted her to complete her section of an insurance form on which its doctor in his section of same had answered a question to the effect her injury did not arise out of her work. The plaintiff-petitioner wrote the defendant-respondent a

letter to the effect Frances M. Mangrum had employed him as her attorney and that he had advised her not to complete her section of the form until the doctor had properly completed his section of same. The defendant-respondent ignored the plaintiff-petitioner and contacted Frances M. Mangrum directly with her informing the plaintiff-petitioner that said defendant-respondent had insisted she complete the form and mail it in resulting in the plaintiff-petitioner writing defendant-respondent another letter to the effect his client, Frances M. Mangrum had been advised not to take any further action in regard to same which she abided by. In spite of same the defendant-respondent continued to deal directly with Frances M. Mangrum while paying her temporary total disability benefits and procuring certain sworn statements from her to the effect of plaintiff-petitioner was not her attorney for approximately eighteen months, or November of 1978, at which time it requested that she have the plaintiff-petitioner write it a letter to the effect he was not nor never had been her attorney so it could settle the case with her on a lump sum basis. When the plaintiff-peitioner refused to do so Frances M. Mangrum complained about his conduct to the Kentucky State Bar Association to which he responded of which she even though same was marked CONFIDENTIAL furnished the defendant-respondent letters to her from said association one of which stated it had authorized charges of unprofessional and unethical conduct against the plaintiff-petitioner all of which he was exonerated of any wrong doing at his trial on same with the employees of the defendant-respondent discussing same among themselves thereby libeling and slandering the plaintiff-petitioner. After said charges were authorized by the Kentucky Bar Association against the plaintiff-petitioner the defendant-respondent proceeded to settle the case with Frances M. Mangrum, even though it contended it had advised her same could not be settled until the attorney client issue between her and the plaintiff-petitioner had been resolved, for the sum of $45,530.55 with the approval of the Workers' Compensation Board whereby it was ordered to pay her immediately in a lump sum the sum of $35,643.75 that being the balance of same due. In violation of said Order Continental Casualty Company paid Frances M. Mangrum the sum

of $11,500.00 by a check payable to her individually and a check for the sum of $6,500.00 payable to her and Louis V. Mangrum, which it later replaced by a check for said amount payable to her individually, and entered a contract with her where it would keep the remaining $17,643.75 and pay same in 141 monthly installments of $125.00 each with final payment of $18.75 depriving her of any interest she could have earned on same exceeded the monthly payment thereon. Such unconscionable conduct of the defendant-respondent as exemplified by said settlement constitutes strong and persuasive evidence of evil motive and intent on its part in regard to the same and toward the plaintiff-petitioner as an obstacle to same because in spite of the unconscionable aspect of same being pointed out to said defendant-respondent in this action it has not corrected same toward Frances M. Mangrum even though she appears to be unable to comprehend same and desperately needs someone to protect her interest in regard to same.

The plaintiff-petitioner, Louis V. Mangrum, being fully aware of the seriousness of the conduct of the defendant-respondent, Continental Casualty Company, both as to his client, Frances M. Mangrum, and himself utilized his only legal rights against said defendant-repsondent by filing his Amended Complaint in the United States District Court For The Western District Of Kentucky on July 14, 1980, alleging the Court had jurisdiction of said action pursuant to Title 28, Article 1332, U. S. C. based on diversity of citizenship seeking damages against the defendant-respondent for tortious interference with a contract of employment, libel and slander, and malicious prosecution. (Rec. D. 2)

Counsel for the parties took certain proof including a deposition of Michael Hooper, Assitant Director of Kentucky Bar Association, wherein he testified Ann Tucker, an employee of Continental Casualty Company, called him and told him she advised Frances M. Mangrum to get rid of Louis V. Mangrum by writing him a letter. (Dep. Hooper, PP. 12-14) Nancy Moore, an employee of Continental Casualty Company, testified that they tried to maintain a personal contact with the claimant. (Dep.

Moore, P. 7, Ls. i-1) That by doing so they could save money where the claimant was not represented by an attorney normally. (Dep. Moore, P. 8, Ls. f-1) That she received a letter from Louis V. Mangrum stating he was the attorney for Frances M. Mangrum and called her in regard to same and was informed that it was sent in error. (Dep. Moore, P. 10, Ls. g-n) That Frances M. Mangrum informed her that she would have the attorney write a letter stating he was not representing her which was on June 17, 1977, (Dep. Moore, P. 11, Ls. c-e) Nancy Moore denied any knowledge of the form completed by Dr. Venables to the effect Frances M. Mangrum's condition was not work related even though a copy of same accompanied the letter from Louis V. Mangrum to her and specifically referred to the error in same. (Dep. Moore, PP. 16 & 17, Ls. b-x, b-m) She further denied remembering any conversation with Frances M. Mangrum regarding same even though Louis V. Mangrum wrote her a letter dated June 18, 1977, concerning same and to the effect Frances M. Mangrum had informed him of her request contra to his advice to Frances M. Mangrum and recommendations. (Dep. Moore, P. 17, Ls. s-v) She admitted she received letters from Louis V. Mangrum dated June 13, 1977 and June 18, 1977. (Dep. Moore, P. 19, Ls i-q) When confronted with the sworn testimony of Frances M. Mangrum as to her telling Frances M. Mangrum that it she had hired an attorney her payments would have to stop because that was the law she denied remembering same and testified she would not have made that statement, but admitted she requested Frances M. Mangrum to furnish her a letter notorized to the effect Louis V. Mangurm was not her attorney. (Dep. Moore, PP. 21-25, Ls. p-x, a-x, a-x, a-x, a-g) The notorized letter of Frances M. Mangrum dated October 4, 1977, is to the effect Frances M. Mangrum was convinced that Louis V. Mangrum representing her as her attorney would mess up her claim with Continental Casualty Company and she said she would not use Louis V. Mangrum unless she had to later. (Tr. Ev. 2nd. T., PP. 73-75, Ls. 23-25, 1-25, 1-14) She admitted as far as she knew she never contacted Louis V. Mangrum concerning the claim of Frances M. Mangrum. (Dep. Moore, P. 27, Ls h-s) William D. Bryant an employee of Continental Casualty Company, testified Frances M. Mangrum sent

a copy of a letter dated May 10, 1979, from the Kentucky Bar Association stating it authorized a charge of unethical conduct against Louis V. Mangrum which he discussed with Ann Tucker, also an employee of Continental Casualty Company. (Dep. Bryant, PP. 33-35, Ls. 0-x, a-x, a-o) Frances M. Mangrum did follow the advice of Louis V. Mangrum in regard to taking any action in regard to the form as Louis V. Mangrum at the first jury trial testified to the effect he had same in Frances M. Mangrum's file at that time. (Tr. Ev. 1st. T.P. 41, Ls. 1-21) Michael Hooper, Assistant Director of the Kentucky Bar Association, on behalf of the Kentucky Bar Association wrote and called Continental Casualty Company in an effort to obtain its file and procure witnesses on behalf of Louis V. Mangrum at the hearing conducted on the charge against him, but Continental Casualty Company refused to cooperate and could not be subpoenaed (Dep. Hooper, PP. 15-17) On or about March 22, 1982, Continental Casualty Company filed a Motion For Summary Judgment supported by a Memorandum of Authorities. (Rec. D. 16) Counsel for Louis V. Mangrum responded to same. (Rec. D. 18) On May 27, 1982, the Trial Court sustained the Motion For Summary Judgment as to libel and slander, and malicious prosecution, and so much of tortious interferrence of contract of employment as related to the action of the Kentucky Bar Association against Louis V. Mangrum. (Rec. Ds. 22 & 23) The Court in so holding related it was of the opinion that the record contained no evidence to support the conclusion that it was Continental Casualty Company which was responsible for Frances M. Mangrum's decision to notify the Kentucky Bar Association (Rec. D. 22) Frances M. Mangrum wrote Ann Tucker, an employee of Continental Casualty Company, a letter dated November 20, 1978, wherein she stated she did not hire Louis V. Mangrum and sought advice as what to do as she did not want her payments to stop. (P1. Px 8) Michael Hooper, Assistant Director of Kentucky Bar Association, testified Frances M. Mangrum called him in early December of 1978, and wrote him a letter on which the Complaint was based. (Dep. Hooper, PP. 4-6) At the first trial of this case before a jury on November 3, 1982, the jury returned a verdict for Louis V. Mangrum and awarded him $6,500.00 pecuniary damages. (Rec. D. 38) The

Court entered Judgment on same. (Rec. D. 39) Louis V. Mangrum filed a Motion For New Trial as the Court did not instruct the jury on punitive damages. (Rec. D. 43) With Continental Casualty Company also moving for a new trial the Court ordered a new trial. (Rec. D. 47) At the second trial before a jury on August 8, 1983, the Court would not admit the letter Louis V. Mangrum wrote Michael Hooper on December 11, 1978, wherein he offered to relinguish all rights to a fee and any action in tort against Continental Casualty Company provided it pay Frances M. Mangrum 100 percent disability with the approval of the Workers' Compensation Board. (P1. Avowel No. 12) Continental Casualty Company had also evaluated the case at 100 percent disability. (P1. PX 12) The Court also refused to admit the terms of the settlement between Continental Casualty Company and Frances M. Mangrum which reflected how it benefited from same to her detriment. (P1. Avowal No. 7) The Court also refused to admit the Statement of Principles in regard to an insurance adjuster dealing with an injured person. (P1. Avowel No. 3) The Court also refused to admit an Authorization signed by Wilbur L. Mangrum in his own case on September 8, 1975, and a Contract he entered with Louis V. Mangrum on November 23, 1976, after the Workers' Compensation Board awarded him total permanent disability which would have affected his credibility as a witness and explained why there was not a written contract with Frances M. Mangrum in this case. (P1. Avowel Nos. 10 & 11) The Court refused to admit the deposition of Michael Hooper. (P1. Avowel No. 2) The Court refused to admit inter office communication wherein it was asked if Frances M. Mangrum had fired her attorney yet. (P1. Avowel No. 5) The Court also refused to instruct the jury on punitive damages even though Louis V. Mangrum tendered same to the Court on August 8, 1983, as reflected by the record (Ct. D. S. between D. 49 & 50) Upon inquiry from the jury while deliberating as to whether or not an Authorization not notorized was a contract of employment the Court informed it the answer was no. (Ct. Ex.No. 1) When counsel for Continental Casualty Company questioned Louis V. Mangrum in particular about same at the first jury trial Louis V. Mangrum testified the Authorization signed by Frances M. Mangrum stated he was her attorney. (Tr.

Ev. 1st. T. PP., 43 & 44, Ls. 14-25, 1-5) The Court on numerous occasions admonished Louis V. Mangrum to just answer the questions thereby limiting the evidence to the extent what occurred could not be portrayed to the jury. (Tr. Ev. 2nd. T., PP. 7, 9, 21, 22, 23, 29, 30, 31, Ls. 1-25, 1-24, 4-17, 10-25, 1-10, 1-13, 3-25, 1-7) The Court at the first jury trial sustained an objection of counsel for Continental Casualty Company on the basis of hearsay which prevented Louis V. Mangrum from stating what Frances M. Mangrum said to him at said time. (Tr. Ev. 1st T. PP., 13 & 14, Ls. 20-25, 1-9) The jury at the second trial of this case on August 8, 1983, found that Louis V. Mangrum was not employed by Frances M. Mangrum to represent her as her attorney. (Rec. D. 51) It rendered a Verdict for Continental Casualty Company. (Rec. D. 52) The Court entered Judgment thereon for Continental Casualty Company. (Rec. D. 54) Louis V. Mangrum moved for a new trial. (Rec. D. 55) The Court overruled same. (Rec. D. 57) Louis V. Mangrum filed a Notice Of Appeal on September 27, 1983, wherein he appealed to the United States Court of Appeals For The Sixth Circuit. (Rec. D. 58) The United States Court of Appeals For The Sixth Circuit Affirmed the Judgment of the Trial Court by Order entered on September 26, 1984. (App. P. 2) The plaintiff-petitioner, Louis V. Mangrum, filed a Petition For Rehearing And Request Same Be En Banc which the United States Court of Appeals For the Sixth Circuit denied by Order entered on November 14, 1984. (App. P. 1)

ARGUMENT

1. SHOULD THIS COURT INTERVENE IN THIS ACTION BY ISSUING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT SO THE APPLICATION OF THE SUBSTANTIVE LAW OF A STATE IN A DIVERSITY CASE MAY BE CLARIFIED AFTER BEING BRIEFED AND TRIED ON ITS MERITS AS IT RELATES TO THREE CAUSES OF ACTIONS IN INTENTIONAL TORTS COMPENSABLE BY BOTH PECUNIARY AND PUNITIVE DAMAGES, INCIDENCE OF BURDEN OF PROOF AND

INSTRUCTIONS TO THE JURY WHEREIN PARTIAL SUMMARY JUDGMENT WAS RENDERED WHEREBY THE COUNT OF LIBEL AND SLANDER AND THE COUNT OF MALICIOUS PROSECUTION, AND SO MUCH OF THE COUNT AS TO THE INTENTIONAL TORT OF INTERFERRING WITH A CONTRACT OF EMPLOYMENT AS RELATED TO THE ACTION OF THE KENTUCKY BAR ASSOCIATION AGAINST THE PLAINTIFF–PETITIONER WAS DISMISSED, AN INSTRUCTION ON PUNITIVE DAMAGES WAS REFUSED AND EVIDENCE RELEVANT AND NECESSARY AS TO THE BURDEN OF PROOF IN REGARD TO MOTIVE AND INTENT WAS EXCLUDED AT TWO JURY TRIALS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY AND AFFIRMED BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT?

The plaintiff-petitioner, Louis V. Mangrum, contends the above question should be answered in the affirmative under the evidence and law of this case for the reasons set forth herein, one of same being because when Rule 403 of Federal Rules of Evidence is utilized in the trial of a Diversity Case involving Intentional Torts it is limited by the application of the Substantive Law of the State incompassing the law of evidence of that State as it relates to the incidence of the burden of proof of state of mind as exemplified by intent and motive requiring guidance from this Court if the desired results are to be accomplished generally speaking and in particular in this specific case.

Twenty years ago this Court in the case of Hanna vs. Plumer, 85 S. Ct. 1136, 380 U. S. 460, 1965, in dealing with the applicaton of the substantive law of the State by the Federal Courts in a diversity case held Rule 4 (d) (1) of Federal Rules of Civil Procedure governed the service of a Summons on an Executor even though the State Law by statute required same be served on him by handing it to him in person rather than leaving it at his residence with a suitable person residing therein stating:

". . . . made it clear that Erie-type problems were not to

be solved by reference to any traditional or common-sense substance-procedure distinction:

And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is * * * does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?"

The plaintiff-petitioner only found one case dealing with application law under Rule 403 of the Federal Rules Of Evidence and the Court even through recognizing the substantive law of Louisiana as to instructions to the jury was applicable did intimate Rule 403 governed in the admisson of evidence as to future earnings where it was contended they were to speculative and conjectural under Louisiana law and went on to reason that its admission was supported by the substantive law of Louisiana allowing recovery for loss of support in a diversity case as shown by the case of Croce vs. Bromley Corporation, 623 F. 2d 1084, 1980. This Court denied certiorari in same on March 9, 1981, 101 S. Ct. 1516, 450 U. S. 981, 67 L. Ed. 2d 816.

Rule 403 of Federal Rules Of Evidence, Exclusion Of Relevant Evidence On Grounds of Prejudice, Confusion, Or Waste Of Time, is as follows.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

The plaintiff-petitioner has not found any case where this Court has utilized any case in the treatment of Rule 403 as it relates to the trial in a diversity case where the application of the substantive law of the State is required.

The United States Courts of Appeals that have dealt with same as shown by the cases cited herein have failed to put the

issues in proper prospective in so doing as they do not deal with the issue as to whether or not the litiation will be significantly affected by the Federal Court disregarding a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court.

The plaintiff-petitioner did point out to the Court of Appeals in his Petition For Rehearing And Request Same Be En Banc that its decision in this case affirming the Judgment of the District Court was contra to its holding in the case of Olin Mathieson Chemical Corporation vs. Allis Chambers Manufacturing Company, 438 F. 2d 833, (Tenn. 6th. Cir.) 1971, in regard to the application of Rule 403 in the reception of evidence whereby the law of Kentucky as shown by the cases of Cook's Adm'r vs. Bank of Josephine, 301 Ky. 193, 191 S. W. 2d 209, 1945, and Harkey vs. Haddox, 244 Ky. 380, 50 S. W. 2d 955, 1932, require the admission of that evidence being complained of being excluded herein due to the nature of the intentional Torts requiring proof of state of mind in and by actions both as to intent and motive.

The plaintiff—petitioner, contends that C. J. S. Vol. 35A, Federal Civil Procedure ¶25, ¶26, and ¶450 are such as to show the incidence of burden of proof as to state of mind in an Intentional Tort case as related to the reception of evidence is substantive law for purposes of Diversity Cases and the law of the State in regard to same should be applied by the Federal Courts.

The plaintiff-petitioner certainly feels this case exemplifies the importance of the reception of evidence that enables the jury to fully understand the case and the conduct of the parties involved because at two trials two juries reached opposite results as to whether or not the plaintiff-petitioner was employed as an attorney with the jury where the evidence was limited more deciding he was not employed simply because when you change the facts in any given matter to be decided you by so doing provoke the necessity of a determination of what occurred based upon that state of facts. With the outcome of the litigation being tied to said issue the evidence pertaining to

same is substantive within the meaning of the Hanna case supra.

A. THE PARTIAL SUMMARY JUDGMENT ISSUE IS AS FOLLOWS:

Rule 56 (c) of The Federal Rules of Civil Procedure concerning summary judgment is to the effect when there is not any genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law summary judgment will be entered.

The plaintiff-petitioner contends in a Diversity Case Rule 56 (c) is concerned with the substantive law of the State which in this particular case is the substantive law of Kentucky pertaining to the Torts of libel and slander, malicious prosecution and intentionally interferring with a contract of employment by illegal means all of which are intentional torts and embody the law of evidence of Kentucky as it relates to the incidence of proof of state of mind percluding the granting of summary judgment as there is inherent a genuine issue as to a material fact, state of mind, which must be proven from the totality of the circumstances as shown by the cases of Cook's Adm'r vs. Bank of Josephine, 301 Ky. 193, 191 S. W. 2d 209, 1945, and Harkey vs. Haddox, 244 Ky. 380, 50 S. W. 2d 955, 1932,

The substantive law of Kentucky as to libel and slander is as follows.

A corporation is liable for libel and slander committed by its employees in the course of its business as shown by the case of Dossett vs. New York Mining and Manufacturing Company, Ky. 451 S. W. 2d 843, 1970.

Under the law of Kentucky the term 'unprofessional conduct' is libelous per se when referring to an attorney as shown by the cases of Massengale vs. Lester, Ky. 403 S. W. 2d 701, 1966, and Registry Newspaper Company vs. Worton, 33 Ky. Law Rep. 840, 111 S. W. 693, 1908.

One who repeats a slander in Kentucky is liable therefor,

though he gives the name of the person from whom he heard the report and states that he does not believe it to be true as shown by the case of Nicholson vs. Rust, 21 Ky. Law Rep. 645, 52 S. W. 933, 1899.

Under Kentucky law both malice and damages are conclusively presumed when libelous matter is per se as shown by the case of Tucker vs. Kilgore, Ky. 388 S. W. 2d 112, 1964.

The undisputed facts in this case in regard to libel and slander as shown by the testimony of William D. Bryant, an employee of the defendant-respondent, is to the effect Frances M. Mangrum furnished them a letter from the Kentucky Bar Association to her dated May 30, 1979, and he and another employee of the defendant-respondent discussed same in the capacities of employees of the defendant-respondent. (Dep. Bryant, PP. 33-35, Ls. L-x, a-x, a-u).

Said letter in part states as follows:

"CONFIDENTIAL Ms. Frances M. Mangrum, 507 Lochridge Street, Mayfield, Kentucky 42066. Re: Louis V. Mangrum, Mayfield, Kentucky Bar Association reviewed the complaint you filed against the above-named attorney and an investigation report concerning the matter.

After due deliberation, the Inquiry Tribunal authorized a charge of unprofessional and unethical conduct be filed against the attorney based on your complaint. (App. P. 9a)"

The plaintiff-petitioner contends that from the above facts and law it is self evident that the District Court and the Court of Appeals erred to the prejudice of the plaintiff-petitioner in granting the defendant-respondent Summary Judgment on the count of libel and slander and this Court's guidance in regard to same is called for as said Courts have failed to correctly discern the implications of this Court's decisions creating a need for clarification in regard to same in the present factual situation.

B. THE ISSUE CONCERNING INSTRUCTING THE JURY IN REGARD TO PUNITIVE DAMAGES IS AS FOLLOWS:

Rule 51 of Federal Rules Of Civil Procedure deals with instructions to the jury subject to the doctrine of plain error thereunder which calls for relief where substantial rights of the parties are involved and the doctrine that relief will be granted without formal compliance where the Trial Court is made aware of the instructions desired.

The substantive law of Kentucky in regard to instructions on punitive damages for Intentional Torts is that same should be given as shown by the cases of Henkin, Inc. vs. Burea Bank & Trust Company and Henkin vs. Dean, Ky. 566 S. W. 2d 420, 1978, and Kentucky Utilities Company vs. Jennings, Ky. 549 S. W. 2d 528, 1977.

With the Trial Court granting a Motion For New Trial of the plaintiff-petitioner based on error at the first trial because of the failure to instruct the jury as to punitive damages even though arbitrary by the Trial Court as shown by its Order granting same, set out in the appendix on Page 5a, the issues pertaining to errors at multiple trials arose where the substantive law of Kentucky and the Federal law is the same and to the effect the granting of a new trial does not affect the errors at a previous trial other than delay the time in which they may be heard on appeal and that even though the judge has discretion in granting a new trial it is a judicial discretion and cannot be done arbitrarily as in this case all of which would require at least the reinstatement of the first Judgment in favor of the plaintiff-petitioner in this case as shown by the cases of Jueau Square Corp. vs. First Wisconsin National Bank of Milwaukee, 624 F. 2d 798, 1980, Collins vs. Wells, Ky. 314 S. W. 2d 572, 1958, Hankins vs. Ford Motor Co., 437 F. 2d 276, 1976, and Sanders vs. Diane, Ky. 432 S. W. 2d 54, 1968, Jamestown Farmers Elevator, Inc. vs. General Mills, Inc., 553 F. 2d 1285, 1976, and Southern Ry. Co. vs. Madden, 235 F. 2d 198, 1956.

C. THE EXCLUSION OF EVIDENCE ISSUE IS AS FOLLOWS:

The record in this case is to the effect that two juries reached opposite findings as to Frances M. Mangrum employing Louis V. Mangrum to represent her in her claim being handled by the defendant-respondent, Continental Casualty Company. Under the evidence admitted at the first trial the jury found that she did. Under the evidence admitted at the second trial the jury found that she did not. The basic difference in the evidence at both trials is that at the first trial the economic benefit or detriment of Louis V. Mangrum, Frances M. Mangrum and Continental Casualty Company was shown and went to the credibility of the testimony of the witnesses as to all facts in this case. Said evidence is to the effect Louis V. Mangrum after receiving a letter from the Kentucky Bar Association dated December 4, 1978, wherein a letter to it from Frances M. Mangrum complaining of his action was enclosed responded by a letter dated December 11, 1978, wherein he offered to relinguish all economic benefit provided Frances M. Mangrum would not receive any economic detriment thereby which was rejected. Said evidence is to the effect Frances M. Mangrum did subsequent to said time suffer economic detriment of a substantial nature in violation of an Order of the Workers' Compensation Board to the economic benefit of Continental Casualty Company.

The substantive law of Kentucky in regard of proof of an act is as follows:

In the case of Cook's Adm'r vs. Bank of Josephine, 301 Ky. 193, 191 S. W. 2d 209, 1945, in which the pertinent facts are; on June 23, 1943, the bank cashed a check for the sum of $999.94 drawn on a lady's account and the next day after discovering it was $2,005.00 short wrote her a letter to the effect it had paid her $2,000.00 too much; at the trial concerning same evidence was tendered and refused to the effect the lady on December 7, 1943, purchased a house from a Mr. Turner and paid him $1,000.00 in $50.00 bills, the dimension of the bills alleged in the overpayment; the Appellate Court reversed stating:

"The evidence was relevant. When there is a question of whether or not a person has done an act, any fact which supplies a motive, or constitutes a preparation for the act or any subsequent conduct having a direct bearing on the act, may be proven."

Motive is defined in Black's Law Dictionary, Fourth Edition, to be:

"Cause or reason that moves the will and induces action, . . . An inducemant, or that which leads or tempts the mind to indulge a criminal act . . .

In the popular mind intent and "motive" are not infrequently regarded as one and the same thing. In law there is a clear distinction between them. "Motive" is the moving power which impels to action for a definite result. Intent is the purpose to use a particular means to effect such result. "Motive" is that which incites or stimulates a person to do an act."

The case of Harkey vs. Haddox, 244 Ky. 380, 50 S. W. 2d 955, 1932, involved proof of the intention of the parties wherein the Court set an attachment aside on the basis it was obtained to defraud creditors in an action in bankruptcy stating:

"What the parties intend may be shown by their conduct, and often this is the best evidence of what they intended . . . Under the rule that a man is held to intend by his act what a reasonable person would intend under such circumstances, the Court cannot escape the conclusion that taking out this attachment and the managing of the case as it was managed was but a device by the parties to secure a preference for the son-in-law when the firm went into bankruptcy . . . But a fact may be proved by circumstances no less than by the declaration of the parties."

Just as the Court in the Harkey case supra could not escape the conclusion everything done was to give the son-in-law a preference, the plaintiff-petitioner, Louis V. Mangrum, from the total circumstances of this case cannot escape the conclu-

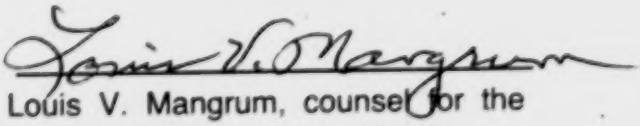
sion that the defendant-respondent Continental Casualty Company, did by its conduct intend for the result to be what they are in this case whereby it would benefit from the detriment caused to others by illegal means.

CONCLUSION

For the reasons set forth herein the plaintiff-petitioner contends that this Court should grant this Petition and issue a Writ Of Certiorari to the United States Court of Appeals For The Sixth Circuit so this case can be briefed and properly utilized by this Court to guide the lower Courts in their action in trying diversity of citizenship cases to promote uniformity in the outcome of same with like cases tried in the State Courts.

Wherefore, the plaintiff-petitioner demands that this Court grant this Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit and decide this case on its merits.

Respectfully submitted,



Louis V. Mangrum, counsel for the plaintiff-petitioner, Louis V. Mangrum

APPENDIX

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No. 83-5709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOUIS MANGRUM,

Plaintiff-Appellant

ORDER DENYING PETITION

FOR REHEARING EN BANC

v.

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee

Before: MERRITT and JONES, Circuit Judges; BELL, District Judge*

A majority of the Court having not voted in favor of an en banc rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and herby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

ENTERED NOVEMBER 14, 1984

*The Honorable Samuel H. Bell, Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

No. 83-5709

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LOUIS MANGRUM,

Plaintiff-Appellant

vs.

CONTINENTAL CASUALTY COMPANY,

Defendant-Appellee

O R D E R

Before: MERRITT, JONES, Circuit Judges and BELL, District Judge*

This cause having come on to be heard upon the record, the briefs and oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and

It is therefore ORDERED that said judgment be and it hereby is affirmed.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman

John P. Hehman, Clerk

ENTERED SEPTEMBER 26, 1984

*The Honorable Sam H. Bell, District Court Judge of the United States District Court for the Northern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

LOUIS MANGRUM, Plaintiff C80-0150 P(J)

V.

CONTINENTAL CASUALTY CO., Defendant

Edward H. Johnstone, Judge

☒ Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT plaintiff recover nothing of the defendant.

This is a final and appealable order with no just cause for delay.

ENTERED AUGUST 12, 1983

/s/ M. Evans
Clerk U.S. District Court
Deputy Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

LOUIS MANGRUM PLAINTIFF

vs CIVIL ACTION NO. C80-0150 P(J)

CONTINENTAL CASUALTY CO DEFENDANT

JUDGMENT ON JURY VERDICT

This action came on for trial before the Court and a jury, Honorable Edward H. Johnstone, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED that plaintiff be awarded damages in the total sum of $6,500.00.

This is a final and appealable judgment and there is no just cause for delay.

Dated at Paducah, Kentucky this 4th day of November, 1982.

JESSE W. GRIDER
Clerk of Court

By Mayme J. Evans
Deputy Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

LOUIS MANGRUM,
PLAINTIFF,

v. CIVIL ACTION
NO 80-0150-P

CONTINENTAL CASUALTY COMPANY,

DEFENDANT.

O R D E R

Both parties have moved for a new trial. Defendant argues that plaintiff's motion was untimely.

Without ruling upon the question of timeliness or upon the results of plaintiff's request, the Court takes the plaintiff's motion as an indication that a new trial is proper.

Accordingly, a new trial is GRANTED.

IT IS SO ORDERED.

DATED: March 24, 1983.

/s/ Edward H. Johnstone

Judge, United States District Court

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY

AT PADUCAH

LOUIS MANGRUM,
PLAINTIFF,

v. CIVIL ACTION
NO 80-0150-P

CONTINENTAL CASUALTY COMPANY
DEFENDANT

MEMORANDUM OPINION

This matter is before the Court on defendant's motion for summary judgment. Plaintiff has filed his brief in response.

Plaintiff, an attorney, has claimed that the defendant wrongfully interferred with an attorney-client relationship he alledgedly had established with a Mrs. Mangrum, the wife of a cousin. Causes based upon libel and malicious prosecution, too, are asserted. Although there appear to be no Kentucky cases dealing with this type of tortious interference claim the elements of this action are discussed in 26 ALR 3d 679, "Liability in tort for interference with attorney-client or physician-patient relationship." The basic elements comprising this cause are the existence of a valid contractual relationship or business expectancy, knowledge of the relationship or expectancy on the part of the interferer, intentional interference inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the party whose relationship or expectancy has been disrupted. 26 ALR 3d at 686; **see also Carmichael-Lynch-Nolan, etc., vs. Bennett, etc.,** 561 S. W. 2d 99 (Ky. Ct. App. 1978), wherein the elements of tortious interference with a contract are discussed.

With respect to the tortious interference claim, the Court is of the opinion that questions of fact exist as to the existence and scope of any contract between Attorney Mangrum and Client

Mangrum and whether defendant, however subtly, may have been responsible for a breach of that contract; thus, as to this count, defendant's motion for summary judgment must be denied. However, plaintiff has argued that the findings and conclusions from the disciplinary proceedings conducted by the Kentucky Bar Association are conclusive as to whether a contract of employment existed between Attorney Mangrum and Client Mangrum. The Court finds that any such conclusions are not to be given an estoppel effect, as the defendant did not participate in those proceedings. **See Parklane Hosiery Co., Inc. v. Shore,** 439 U.S. 320, 99 S. Ct. 645, 58 L. Ed. 2d 549 (1979); **Sedley v. City of West Buechel,** 461 S.W. 2d 556 (Ky. 1971)

The claims of libel and malicious prosecution both have their foundations upon the bar proceedings and the purported encouragement, inducement, etc. of Mrs. Mangrum by the defendant to notify the KBA with her complaint. The role of the defendant, construing the evidence most favorably to plaintiff, was that it required Mrs. Mangrum to obtain a letter from plaintiff to the effect that he had never represented her, and that without this letter she would lose her Workers' Compensation benefits. Plaintiff was unwilling to write such a letter, and thus Mrs. Mangrum contacted the bar association. Mrs. Mangrum has testified that it was her husband's idea to contact the bar (Mangrum dep., pp. 19-20, 22, 25) and defendant's Mr. Bryant testified that he has no recollection of discussing with Mrs. Mangrum her contacting the KBA before she wrote her complaining letter. (Bryant dep., pp. 33-34); Mangrum dep. p. 32).

The Court is of the opinion that the record contains no evidence to support the conclusion that it was the defendant which was responsible for Mrs. Mangrum's decision to notify the bar. Defendant may have caused Mrs. Mangrum to seek the letter from the plaintiff and to terminate her business relationship with him. However, Mrs. Mangrum was responsible for the course followed upon plaintiff's refusal to accomodate her by writing the letter, and this specific decision to complain to the KBA was reached without the knowledge, of or encouragement or inducement from, the defendant.

Accordingly, summary judgment as to counts two and three and so much of count one as relates to the bar proceedings is granted.

DATED: May 25, 1982.

/s/ Edward H. Johnstone

Judge United States District Court

May 30 ,1979

CONFIDENTIAL

Ms. Frances M. Mangrum
507 Lochridge Street
Mayfield, Kentucky 42066

Re: Louis V. Mangrum
Mayfield, Kentucky

Dear Ms. Mangrum:

On March 13, 1979, the Inquiry Tribunal of the Kentucky Bar Association reviewed the complaint you filed against the above-named attorney and an investigation report conerning the matter.

After due deliberation, the Inquiry Tribunal authorized a charge of unprofessional and unethical conduct be filed against the attorney based on your complaint. If a trial hearing becomes necessary in this matter, you will be notified in order that you can appear and testify on behalf of the bar association.

You will be notified of subsequent developments.

Sincerely,

/s/ G. Whitmer
Director

LGW/kba